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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1188

JAMES R. SCHLESINGER, Secretary of Defense, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

This action challenges and seeks to end an open and notorious violation by petitioners, officials of the executive branch, of Article I, § 6, clause 2 of the Constitution. That provision, the Incompatibility clause, petitioners' Brief (Br.) 2-3, was intended to

prevent members of Congress from simultaneously holding any executive branch office. The violation at issue here is that the Secretaries of Defense and the subordinate Secretaries of the Army, Navy and Air Force (petitioners here) maintain members of Congress as officers or enlisted members of the armed forces reserves after they become and while they remain Senators and Representatives.

At the time this action was filed 130 Senators and Representatives, members of the 91st Congress, were reservists. The election of November 1970 reduced the number to 120 and the appointment of a member to the Cabinet reduced the number to 119 reservists in the 92d Congress. The number has been further reduced to 107 in the 93d Congress. Br. 43 n. 16; Pet. App. D.

Twenty-three are "active" reservists. As such they may participate in training (but without pay). Pet. App. D 49. They may thereby earn points toward retirement. At the time of the District Court's judgment (but no longer, by a new regulation promulgated by defendants) they also thereby earned points toward promotion. They can be ordered to active duty at any time for up to 15 days (or longer in a Congressionally declared national emergency). 10 U.S.C. § 672; Jt. App. 4, ¶ 10. While on such involuntary active duty or in voluntary training they are subject to military discipline and court martial under the Uniform Code of Military Justice. 10 U.S.C. §§ 267(b), 672-674, 802.

Fifty-five Congressmen are retired from the reserves without retirement pay. Pet. App. D 50. Some of them may be eligible to receive retirement pay at age 60. 10 U.S.C. §§ 1331, 1332. Sixteen are retired with pay. Pet. App. D 51. Twelve are in "inactive

standby" status. Pet. App. D 49. Retired and inactive standby reservists do not train, are not promoted, receive only retirement pay, are subject to call in a Congressionally declared national emergency and while on such involuntary active duty or while hospitalized in a military hospital (e.g., Walter Reed Hospital, Bethesda Naval Hospital; for retirees only) are subject to military discipline and court martial under the Uniform Code of Military Justice. 10 U.S.C. §§ 672, 802, 1331.

One hundred six of the 107 Congressmen-reservists are commissioned officers. Reserve officers below general and admiral are commissioned by the President and hold their commissions at his pleasure. Generals and admirals are nominated by the President and confirmed by the Senate. 10 U.S.C. § 593; Jt. App. 4, ¶ 12. Four of the members are major-generals and two are rear admirals. Pet. App. D.

Thus the head of the Executive branch has appointed Congressmen to hold reserve commissions and may remove them at his will. In certain circumstances he may call them to uniform or refrain from doing so, or call some and not others. Those whom he calls and others who may volunteer he may discipline. He may, and has in the past, provide Congressmen-reservists with pay, promotions and other perquisites of military office. (Jt. App. 5, ¶ 5; 35 Fed. Reg. 2871 (1970).[1] That these powers may be limited, either permanently by statute or temporarily by regulation, and may never have been abused, does not remove the potential for abuse.

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[1] On the other hand, not a single Congressman-reservist has been called upon to serve in a national emergency since the end of World War II. Jt. App. 7, ¶ 20.

The temptation to the executive branch to exercise influence and the potential for reservist-Congressmen to find themselves in a conflict of interest is compounded by the fact that reservists in greatly disproportionate numbers hold key positions in the Congress, particularly in the committees concerned with military affairs, veterans affairs and appropriations. Jt. App. 5-6, ¶¶ 18-19; Pet. App. B. 26-27, fn. *. Moreover, they are all in a position to vote on such matters as military appropriations and retirement benefits for the benefit of reservists including themselves.

Not only, as the District Court found, Pet. App. B 26-27, 30, is there a substantial potential for conflict of interest between the Congressman's duties as a Congressman and his interest as a reservist. The public record is replete with instances of actual conflict. Some of these instances are collected in Respondent's Appendices (Resp. App.) A-E to this brief.

Resp. App. A describes the controversy in the Congress over an attempt by the then Secretary of Defense, Robert McNamara, to reorganize and reduce the armed forces reserves. It describes the role of Congressmen-reservists, influenced by their own status as reservists, in defeating the reorganization plan. Resp. App. B describes how the Reserve Officers Association and Congressmen-reservists work together on legislation of interest to the Association. Resp. App. C lists some representative legislation, and D and E collect other examples of conflict of interest.

The potential for executive influence and for Congressional conflict of interest would disappear and no more actual conflicts would arise if the Defense Department and the Armed Services, under the direction of

petitioners, did not continue to maintain Congressmen in the armed forces reserves. Respondents brought this action in May, 1970, in order to end the practice by enforcement of the earliest conflict of interest provision in our laws. Respondents alleged (Pet. App. C 41-42, 45-47) that executive branch influence resulting from violation of the Incompatibility clause taints Congressional consideration of respondents' and other like-minded citizens' views about the military, war and peace. Success in the action would in addition prevent continued appropriations of public moneys that—again in violation of the Incompatibility clause—may redound to the Congressmen's benefit as reservists, and prevent continued favoritism in reserve promotions and assignments to Congressmen to the detriment of other reservists including plaintiffs.

Respondents sought a declaratory judgment, injunction and mandamus. Petitioners filed a motion to dismiss, respondents moved and petitioners cross moved for summary judgment. Jt. App. 1. In April, 1971, on the basis of the pleadings and matters of public record of which it could take judicial notice[2] the District Court granted summary judgment for respondents on the underlying legal issues, holding (1) that respondents have standing to sue as citizens (but not as taxpayers or as reservists), Pet. App. B 27-31; (2) that a reserve commission is an office within the meaning of the Incompatibility clause, Pet. App. B 23-27; (3) that the purpose of the Incompatibility clause is to maintain separation of the legislative and executive powers and prevent executive branch influence on and subversion of members of the legisla-

[2] E.g., Resp. App. A and E were before the District Court in another form.

tive branch, Pet. App. B 20-22; and (4) that the duty of petitioners to carry out the Incompatibility clause by removing Congressmen from the reserves, and their failure to carry out that duty, are adjudicable by a court, Pet. App. B 31-34.

The District Court thereupon issued a declaratory judgment "that Article I, § 6, clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office, . . ." Pet. App. B 34-36. But because of various factors, chiefly that "there is no reason to believe that Congress and the Executive will be unable to accommodate themselves voluntarily to the decision" if it be affirmed by this Court, the District Court withheld the specific equitable relief respondents had requested. Pet. App. B 35.

Petitioners appealed the grant of the declaratory judgment. Respondents did not appeal the denial of equitable relief.[3] In October, 1972, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court in a brief *per curiam* order. Pet. App. A.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Were the lower courts correct in holding:

a. That plaintiffs have standing to sue to enforce Article I, § 6, clause 2 of the United States Constitution (the Incompatibility clause);

b. That the purpose of the Incompatibility clause is to maintain separation of the legislative and execu-

[3] If respondents prevail in this Court and petitioners fail to take appropriate steps to comply with the law as here declared, respondents may petition the District Court for further specific relief. 28 U.S.C. § 2202; Powell v. McCormack, 395 U.S. 486, 499.

tive powers and prevent executive branch influence on and subversion of members of the legislative branch;

c. That the duty of defendants to carry out the Incompatibility clause by removing Congressmen from the reserves, and their failure to carry out that duty are adjudicable by a court;

d. That a reserve commission is an office within the meaning of the Incompatibility clause?

2. Were the lower courts correct, on the basis of these holdings, in issuing and affirming a declaratory judgment that Article I, § 6, clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office?

SUMMARY OF ARGUMENT

1. Respondents have standing to sue as citizens, as the lower courts held. Under the controlling decisions of this Court respondents have sufficiently alleged and have shown the necessary injury to their own interests. The interest protected by the Incompatibility clause is the interest in preventing executive branch influence upon and conflicts of interest among members of Congress. That this interest is widely shared, among all citizens, is no bar to standing. *United States* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 2405. Respondents have alleged injury to themselves. The violations of the Incompatibility clause challenged here, i.e., Congressmen holding military office, creates influence on Congressional decisions on military and especially reserve matters. This influence injures respondents' ability to persuade the Congress in directions favored by respondents. Such an injury, albeit

"political" in nature, is to a right protected by the First Amendment, the right of association to petition.

Respondents also have standing as taxpayers. As in *Flast* v. *Cohen*, 392 U.S. 83, respondents challenge expenditures under Article I, § 8 of the Constitution, the taxing and spending clause. The expenditures challenged here are made for "the common defense;" in *Flast* they were made for "the general welfare;" both purposes are of equal weight in Article I, § 8. Respondents also satisfy the second branch of the *Flast* test; they allege that the expenditures violate a specific constitutional prohibition. Whereas in *Flast* the prohibition was against supporting an establishment of religion in violation of the First Amendment, in this case the prohibition is against expending tax funds to support Congressmen's enjoyment of an executive branch office in violation of the Incompatibility clause.

2. The case is justiciable. The Incompatibility clause was not intended to create a "qualification" for membership in Congress like those of age, citizenship and inhabitancy. Instead it was intended to declare the incompatibility of holding both legislative and executive office. As such it declares that a member of Congress may not hold an office, as much as it declares that the holder of an office may not be a member of Congress.

Respondents do not seek the expulsion of Congressmen-reservists from the Congress, a matter which may be committed to the Congress alone. They seek a remedy to compel Executive officers to remove Congressmen-reservists from their office, a matter well within the power of the courts. Indeed this is the preferred remedy to remove the incompatibility—especially if

the member is elected to Congress while already a reserve officer: "the second office vacates the first."

Since the question of removal from executive office is not committed to the Congress by the Constitution, it is justiciable by the courts. Moreover, petitioners' own necessary participation in maintaining Congressmen in the office is subject to challenge in and adjudication by courts, for all branches are bound to obey the Constitution.

3. Reserve membership is an "office" within the meaning of the Incompatibility clause. "Office" involves "tenure, duration, emoluments, and duties." *United States* v. *Hartwell,* 6 Wall. 385, 393. A commissioned officer has "tenure;" reservists enlist for definite terms—"duration;" while on duty they are maintained out of government stores, lodged in government billets, transported in government vehicles and use government equipment and when retired they receive retirement pay—"emoluments;" they are subject to call and military discipline—"duties." Second, the definition of "office" must be examined with reference to the intention of the clause, to prevent executive influence on the legislature. Even the most attenuated characteristics of office create the danger of such influence and therefore must be held barred by the clause.

Neither a narrow Court of Claims decision, *Simmons* v. *United States,* 55 Ct. Cl. 56 (1920) nor a narrowly intended statute, 5 U.S.C. § 2105(d), change this. Both were directed solely at removing a possible bar against reservists who were attorneys representing claimants against the government.

ARGUMENT

I. RESPONDENTS HAVE STANDING

A. Standing as Citizens

1. Petitioners challenge respondents' standing to sue on the ground that respondents have not alleged injury but "only an interest in governmental affairs, common to all citizens and taxpayers . . .," Br. 10, relying on *Sierra Club* v. *Morton*, 405 U.S. 727. They seek to distinguish *United States* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 2405, on the ground that the dispositive factor was that the students' allegations of environmental and aesthetic injury to nature were localized to the vicinity of Washington, D. C. Br. 13-14. They rely on *Frothingham* v. *Mellon*, 262 U.S. 447, Br. 13, *Ex Parte Levitt*, 302 U.S. 633, Br. 16, 17, *Laird* v. *Tatum*, 408 U.S. 1, Br. 17 and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, Br. 18. They assert that there is no case or controversy here, Br. 18, and alternatively argue that if there is, respondents should take comfort in asserted (but at least here unexerted) authority of the Congress to vindicate the Incompatibility clause, and in action by one of the respondents, taken shortly after this case was filed, to reduce in part the benefits that Congressmen receive from reserve office, Br. 19-20. Finally they argue that to admit respondents' standing to sue here would swamp the federal courts with litigation. Br. 25-29.

The familiar decisions of this Court that have narrowed the obstacle of standing demonstrate a commitment to permitting important grievances of private citizens against an increasingly all-powerful government to be litigated in the courts, not fought in the streets. This development has marched carefully, nevertheless, within the confines of Article III "case

or controversy." This case is well within the principles thus established by this Court.

2. The basic requirement for standing is that the plaintiff allege "injury in fact." Such injury may be economic, *Association of Data Processing Service Organizations, Inc.* [*ADAPSO*] v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159; environmental or aesthetic, *United States* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 2405; *Sierra Club* v. *Morton*, 405 U.S. 727; political, *Baker* v. *Carr*, 369 U.S. 186, or religious, *Flast* v. *Cohen*, 392 U.S. 83; *Abington School District* v. *Schempp*, 374 U.S. 203. The injury may be to a narrow class, e.g., *ADAPSO, supra*, or it may be widely shared, *Sierra Club, S.C.R.A.P.*, both *supra*. The injury alleged must be such as was reasonably intended to be prevented by the statute or constitutional provision invoked. *ADAPSO, supra*, 397 U.S. at 153.

Allegations of "injury in fact" make out the showing of a "personal stake in the outcome of the controversy," *Baker* v. *Carr, supra*, 369 U.S. at 204, required to satisfy Article III, and ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen, supra*, 392 U.S. at 101, quoted in *ADAPSO, supra*, 397 U.S. at 151-52.

Here the respondents alleged in their complaint (Pet. App. C 41-42, 45-46) very specific injuries to their ability to influence the Congress, to join with others in an effort to make political advocacy effective, *NAACP* v. *Button*, 371 U.S. 415, 452 (dissenting opinion of Harlan, J.)—a right protected by the First

Amendment. See *Williams* v. *Rhodes*, 393 U.S. 23; *NAACP* v. *Button, supra; Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296; *NAACP* v. *Alabama*, 357 U.S. 449, 460; see also *Shakeman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970) *cert. denied*, 402 U.S. 909; *Nat'l Ass'n for Community Development* v. *Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973); *Common Cause* v. *Democratic National Committee*, 333 F. Supp. 803 (D.D.C. 1971); *Rising* v. *Brown*, 313 F. Supp. 824, 826 (C.D. Cal. 1970). The impairment or dilution of a citizen's ability effectively to petition and advocate his views to the Congress is as much an injury as the mathematical dilution of his vote by malapportionment. *Baker* v. *Carr*, 369 U.S. 186.

Indeed this injury to respondents is widely shared, by all citizens who—for example—oppose legislation unduly favoring members of the Armed Forces reserves, Resp. App. C, D, or who would favor legislation abolishing the reserves, Resp. App. A. *Cf.* Pet. App. C 42, ¶ 16(c); 45, ¶ 30. But this Court has

> already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons across the Nation could be adversely affected by major governmental actions. See, e.g., Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 428 F.2d 1093, 1097 (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Reade v. Ewing, 2 Cir. 205 F.2d 630, 631-32 (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fact injured simply because many others are also in-

jured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

United States v. *S.C.R.A.P., supra,* —— U.S. ——, 93 S.Ct. at 2416.

S.C.R.A.P. also establishes that the fact that injury is not "direct and perceptible," and is found at the end of an "attenuated line of causation" does not bar standing to sue. — U.S. at —, 93 S.Ct. at 2416. Here, indeed, no such "attenuated line of causation" need be followed. The assumption that citizens' advocacy is expected to, can and does influence their elected government is at the heart of the constitutional compact. Any bar to the effectiveness of such advocacy likewise affects the outcome of governmental action on the issue involved. There could hardly be a more serious and important injury to a citizen, short of loss of his right to vote or the establishment of a form of government, contrary to the system of our Constitution, that would not be responsive to the views, opinions and advocacy of citizens.[4]

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[4] The District Court held that than "any injury which might result from Congressmen holding Reserve Commissions is hypothetical," but that the "hypotesis is not concocted by plaintiffs but underlies the constitutional provision itself." Pet. App. B 30. The District Court did not permit discovery, *id.* 29. Respondents respectfully differ with the District Court on the question whether the injury is hypothetical, and the analysis in text and the appendices to this brief show how real the injury is. But respondents would agree with the District Court's unstated premise that, with a constitutional provision as narrow and as precise as this, an independent showing of injury to the plaintiffs may be unnecessary. Here the Framers themselves made the equivalent of a legislative finding that the evil the Incompatibility clause was intended to pre-

3. A second requirement of standing is that there be an ascertainable relationship between the injury alleged and the constitutional or statutory provision alleged to be violated. That is, the "interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *ADAPSO, supra,* 397 U.S. at 153. Put another way, there must be "a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen, supra,* 392 U.S. at 102.

The purpose of the Incompatibility clause, Article I, § 6, cl. 2, whose violation by petitioners is at issue here, was to preserve the separation of powers—specifically to protect the independence of the legislative branch from the influence of the executive branch. Pet. App. B 18-22; pp. 22-24, 37-39, *infra.* It was designed to prevent actual or even the potential of a conflict of interest between a member of Congress' duty as a legislator and obligations owed to or pressure created by the executive if the member held or might expect appointment to executive branch office. *Ibid.* Here

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vent created so great a danger of injury that the evil had to be absolutely prevented; respondents are therefore in the position of private attorneys general. Flast v. Cohen, 392 U.S. 83, 120 (dissenting opinion of Mr. Justice Harlan) and cases there cited; Jaffe, Standing Again, 84 HARV. L. REV. 633, 637-8 n. 24 (1971).

In their response to this passage in the District Court's opinion petitioners seem to admit that respondents indeed have alleged "injury," but that such injury is insufficient as a basis for standing because it is only to a "general interest." Br. 16. This concession would appear to dissolve petitioner's defense, for as long as the "interest" is within "the zone of interests protected" by the Incompatibility clause, as we show pp. 14-15, *infra,* then standing exists, however, "general" or widely shared the interests, pp. 11-13, *supra.*

citizens (these respondents) have an interest in Congress' consideration of military measures. Pet. App. C 42, 45-46. The more than 100 members of Congress who hold Armed Forces reserve commissions are in precisely the position of potential conflict of interest that the Incompatibility clause was intended to prevent, and indeed instances of actual conflict have been common. Resp. App. A-E. Respondents, as citizens who desire to advocate to the Congress views on military measures, have an "interest . . . within the zone of interests to be protected" by the Incompatibility clause, and the "logical nexus" between this status and the clause is similarly established.

4. The District Court remarked in its discussion of standing as citizens that "it is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as practical matter no one can." Pet. App. B 31. Petitioners make much of this phrase and call it "revolutionary in its implications." Br. 19. This Court has held, however, that the standing requirement "does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Sierra Club* v. *Morton, supra,* 405 U.S. at 740. To find that the status of citizen is as capable of conferring standing to protect public interests through the judicial process as the status of taxpayer, *Flast, supra,* or the status of user of air and water or admirer of natural beauy, *S.C.R.A.P., supra, ADAPSO, supra,* 397 U.S. at 154, is hardly "revolutionary." More particularly it is not revolutionary in this case, given the specificity and narrow scope of the Constitutional provision involved here and the

precise nature of the injury alleged, see pp. 11-13, *supra*.[5]

These considerations show the inapplicability of petitioners' authorities. Thus Mr. Levitt, *Ex Parte Levitt*, 302 U.S. 633, did not claim that any interest of his could in any way have been harmed by Justice Black's taking his seat. His only interest was as a member of this Court's bar; he did not assert that Justice Black's alleged ineligibility could in any way deprive Levitt of the unbiased consideration by the Court of anything.[6]

Mrs. Frothingham in *Frothingham* v. *Mellon*, 262 U.S. 447, argued that various Federal programs exceeded the power of Congress because they infringed on the residuary grant of power to the states in the

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[5] Moreover, in determining whether the litigant before them has standing, courts have frequently considered whether anyone else has a greater stake and would be likely to challenge the governmental acts in issue. See Linda R.S. v. Richard D., 410 U.S. 614, 619 n.5, p. 17, *infra*. This point is especially significant when—as here—the right sought to be protected is a publicly important one. See, e.g., Nat'l Association of Securities Dealers v. SEC, 420 F.2d 83, 99, 100 (D.C. Cir. 1969), aff'd sub nom. Investment Company Institute v. Camp, 401 U.S. 617 (see also concurrence of Burger, J., 420 F.2d at 108); Curran v. Laird, 480 F.2d 122, 139-140 (D.C. Cir. 1969) (en banc) (concurring and dissenting opinion); Scanwell Laboratories v. Schaffer, 424 F.2d 859, 870 (D.C. Cir. 1970). Implicit acceptance of this principle can be seen in a number of cases decided by this Court, as well. See, *e.g.*, School District of Abington Township v. Schempp, 374 U.S. 203; Engel v. Vitale, 370 U.S. 421; Everson v. Board of Education, 330 U.S. 1; Wilson v. Shaw, 204 U.S. 24; Millard v. Roberts, 202 U.S. 520; Bradfield v. Roberts, 175 U.S. 291. See also United States v. S.C.R.A.P., — U.S. —, 93 S. Ct. 2405, 2417 n.14.

[6] The proceeding was not a lawsuit by a citizen, as petitioners mistakenly assert, Br. 14., but a motion to this Court in its original jurisdiction filed by a member of this Court's bar.

10th Amendment and exceeded the general powers of Article I, § 8. *Flast* v. *Cohen, supra,* 392 U.S. at 105. Thus she did not allege—as this Court pointed out in *Flast, ibid.,* "a breach . . . of . . . specific constitutional limitations."

Mrs. Frothingham also lacked standing because she was asserting not her own but another party's interest, "the State's interest," *Flast, supra,* 392 U.S. at 105, the same infirmity that deprived plaintiffs of standing in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, where a non-member of the lodge had no standing to assert the interest of members, *i.e.,* to "seek redress for injuries done to others," 407 U.S. at 166, and in *Laird* v. *Tatum,* 408 U.S. 1, where plaintiffs who admitted that they themselves had suffered no harm from Army surveillance practices were denied standing to raise the chilling effect of such practices on nameless "millions" of others, 408 U.S. at 13-14, n.7 (quoting *Irvis*).

Finally, *Linda R. S.* v. *Richard D.,* 410 U.S. 614, confirms the soundness of the principle underlying the statement of the District Court that petitioners call "revolutionary." There the plaintiff was denied standing because, *inter alia,* there were other parties with a better right to raise the issue, so that denial of standing in *Linda* would not "prevent any public interests from being protected through the judicial process." 410 U.S. at 619 n.5, quoting *Sierra Club* v. *Morton, supra.*[7]

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[7] Contrary to petitioners' assertions, there are not "many constitutional provisions which, for one reason or another cannot be vindicated in the courts." (Br. 18-19, n.6 The cases cited in support were premised on rationales having no relevance here, and related to very different factual situations. In Kentucky v. Dennison,

5. A major portion of petitioners' standing argument (Br. 25-29) is devoted to a sermon on the need for and utility of the vigorous adversary presentation of important constitutional issues that is guaranteed by litigants' "personal stake in the outcome of this controversy." Respondents have no quarrel with the premise. We suggest, however, that citizens frustrated in their efforts effectively to petition the Congress, as here, have at least as much "personal stake" as that which this Court found gave standing to a citizen who objected to the dilution of his vote in *Baker* v. *Carr, supra,* and to a citizen who objected to diversion to religious schools of a portion of the Treasury to which his taxes contributed in *Flast* v. *Cohen, supra.*

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24 How. 66, the Court ruled that neither the Constitution nor the Act enforcing the provision in question provided the means to compel execution of the constitutional duty. The Court's reluctance to provide a constitutional remedy does not reflect the modern trend. See, *e.g.*, Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388; W. Dellinger, *The Constitution as a Sword,* 85 HARV. L. REV. 1532 (1972); A. Hill, *Constitutional Remedies,* 67 COLUM. L. REV. 1109 (1967). *Mississippi* v. *Johnson,* 4 Wall. 475, held that no action could lie to restrain the President from performing the political and discretionary duties involved in administering the Reconstruction Acts. In Pacific Telephone Co. v. Oregon, 223 U.S. 118, the Court followed the well settled principle that the enforcement of Article IV, section 4 belonged only to Congress by its very wording, and because of its unique political character. The Court noted that plaintiffs were not "testing some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limit, but were [suing Oregon] to demand of the state that it establish its right to exist as a state republican in form." 223 U.S. 150-51. Not surprisingly, the Court held that determination of whether a state had a republican form of government was a "purely political" question, which only Congress could resolve. Further with respect to the guarantee clause and Luther v. Borden, 7 How. 1, see Berger, Impeachment, The Constitutional Problems 107-08 (1973).

These decisions were reached over the strong, scholarly and carefully argued dissents of Justices Harlan and Frankfurter, *Baker, supra,* 369 U.S. at 266, 330; *Flast, supra,* 392 U.S. at 116. Petitioners echo the arguments that these great Justices made, but which have been rejected by this Court in those decisions and in the decisions that have followed.

Petitioner also raises the specter of a flood of litigation (Br. 27). Suffice it to say, with knowledgeable Courts of Appeals, that this specter has yet to materialize and perhaps should now be laid to rest. *Scanwell Laboratories* v. *Shaffer,* 424 F.2d 859, 872-73 (D.C. Cir. 1970); *Scenic Hudson Preservation Conference* v. *FPC,* 354 F.2d 608, 617 (2d Cir. 1965); see Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450, 468-71 (1970). As the *Scanwell* court noted, 424 F.2d at 872, courts have ample tools and power to avert frivolous lawsuits.

B. Standing as Taxpayers

Petitioners assert that respondents do not have standing as taxpayers under *Flast* v. *Cohen, supra,* arguing that Congress' support of its members in the reserves is not an exercise of the taxing and spending power and that the Incompatibility clause is not a restriction on the exercise of the taxing and spending power—the two criteria set out in *Flast.* Br. 22-23.

Article I, § 8 reads:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and *provide for the common Defence* and *general Welfare* of the United States. . . . (emphasis added)

In *Flast* a taxpayer challenged an expenditure of tax funds "for the . . . general welfare" under Article I, § 8, to support education in religious schools. 392 U.S. at 87. Here respondents challenge an expenditure of tax funds "for the common defence".[8] The relevant appropriations acts make it plain that support of the Armed Forces reserves, including their Congressmen-members, is an exercise of the Article I, § 8, taxing and spending power for "the common defense."

Public Law 92-156, 92d Cong., 1st Sess. (1971) appropriates funds for military procurement and in Title III provides for the authorized strength of the reserves. This was a bill providing for the common defense:

> *Defense and priorities*
>
> As the Nation debates its many serious domestic needs in an atmosphere of weariness with the war in Vietnam, it is important to remember that a superior defense capability is and must remain our No. 1 national priority. Deterrence of nuclear war, control of the seas, and the power to carry out those overseas obligations essential to collective security are fundamental to our existence as a nation. Without the capability to perform these

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[8] The debate about whether the Article I, § 8 power to tax and spend "for the common defence and general welfare" was limited to taxation and expenditure for the enumerated purposes immediately following, as asserted by Madison, or transcended the enumerated powers, as asserted by Hamilton, has been settled in favor of Hamilton. United States v. Butler, 297 U.S. 1, 65-66; Corwin, The Spending Power of Congress—Apropos the Maternity Act, 36 HARV. L. REV. 548 (1923). See also United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 681:

> Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defence and general welfare.

> missions and the security it brings, domestic progress would not be possible. Reasonable men may differ about what specific sizes and capabilities of military forces are necessary for national security. But given the long leadtimes required to develop modern weapons, the growing capabilities of our potential adversaries, and the high degree of uncertainty in today's world, it is clear that we must plan for more defense than that which is barely enough.
>
> It is also extremely important that, given the other burdens borne by the Federal taxpayer, the Department of Defense be authorized no more funds than will prudently be needed to maintain an adequate national security. Having in mind also the importance of the economy, the committee recommends authorizing a total of $21.018 billion which is a 5.3 percent reduction in the total request.

S. Rep. No. 92-359, 92d Cong., 1st Sess. (1971) at 15; see *id.* at 113-118. To the same effect, at greater length, see H.R. Rep. No. 92-232, 92d Cong., 1st Sess. (1971) at 8 *et seq.*

Public Law 92-145, 92d Cong., 1st Sess. (1971) appropriated funds for the acquisition and construction of military installations, including reserve force facilities (Title VII). Its defense purposes were broad. H.R. Rep. No. 92-362, 92d Cong., 1st Sess. (1971), at 3 ("Troop Housing"); 5 (appropriations "for the improvement and modernization of the Vietnamese Armed Forces"); 7 ("Pollution Abatement"), 10 ("improvement of the crosswind runway at Keflavik [Iceland] Airport"); 40 ("Defense Atomic Support Agency;" "Defense Supply Agency"); 42 ("Family Housing"); 49 ("Homeowners Assistance"). See especially *id.* at 53, listing appropriations for "Reserve

Forces Facilities", including "armory-type facilities . . . air pollution control facilities . . . water pollution control and personnel support facilities."

The 1972 appropriations were similar:

P.L. 92-545, 92d Cong., 2d Sess. (1972) [authorization of funds for construction and development of reserve force facilities (Title VIII)]; P.L. 92-547, 92d Cong., 2d Sess. (1972) [appropriation of funds for the acquisition, construction, rehabilitation and conversion of military installations, including reserve facilities]; P.L. 92-570, 92d Cong., 2d Sess. (1972) [appropriations of funds for pay, allowances, clothing, subsistence, travel and related expenses for military personnel, including the reserves (Title I); retirement pay for military personnel including reserves (Title II); for the operation and maintenance of the armed forces, including the reserves (Title III)].

These are expenditures made for the common defense under the taxing and spending clause and satisfy the first prong of the dual *Flast* test.

Respondents also satisfy the second *Flast* prong, for the Incompatibility clause was expressly intended by the Framers as a check on the exercise of the taxing and spending power. It was an explicit purpose of the Framers to prevent the executive branch from holding out the prospect of lucrative office in order to exercise influence over the Congress—in short, to prevent the purchase of Congressional support by expenditure of appropriated tax funds.

The Framers devised the Incompatibility Clause (See, Pet. App. B. 20-22) as a way of nipping in the bud the "venality and corruption" seen to be rife in

England because of the crown's preferment of members of Parliament to office. Pet. App. B 20. The matter was taken up at the Convention on August 14, 1787. Charles C. Pinkney had argued that the executive should not be deprived of the talents of members of Congress but proposed that they be allowed to serve in the executive without compensation. 2 Farrand, *The Records of the Federal Convention of 1787*, 283-4 (1911). George Mason then

> ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American Soil—for compleating that Aristocracy which was probably in the contemplation of some among us and for inviting into the Legislative service, those generous & benevolent characters who will do justice to each other's merit, by carving out offices & rewards for it. In the present state of American morals & manners, few friends it may be thought will be lost to the plan, by (the opportunity) of giving premiums to a mercenary & depraved ambition.

Id. at 284.

Then Elbridge Gerry remarked (referring particularly to ambassadors):

> If they are once appointed, the House of Reps. will be obliged to provide salaries for them, whether they approve of the measures or not. If men will not serve in the Legislature without a prospect of such offices, our situation is deplorable indeed. If our best Citizens are actuated by such mercenary views, we had better chuse a single despot at once. It will be more easy to satisfy the rapacity of one than of many. According to the idea of one Gentleman (Mr. Mercer) our Government it seems is to be a Govt. of plunder. In that case it certainly

would be prudent to have but one rather than many to be employed in it.

Id. at 285.

Roger Sherman remarked that "the Constitution should lay as few temptations as possible in the way of those in power." *Id.* at 287. To James Wilson's objection that the clause would discourage men of talent from entering public service, Oliver Elsworth "did not think that the mere postponement of the reward [until after the member leaves the Congress] would be any material discouragement of merit." *Id.* at 288. John Randolph of Roanoke was "opposed to the striking out of the clause; as opening a door for influence & corruption." *Id.* at 290. The matter was then postponed to September 3.

On that day, Pinkney again raised his earlier amendment to make members "incapable of holding any office under the United States for which they or any other for their benefit, receive any salary, fees or emoluments. . . ." *Id.* at 489. Again Randolph "was inflexibly fixed against inviting men into the Legislature by the prospect of being appointed to offices." Mason again insisted that "ineligibility will keep out corruption, by excluding office-hunters." *Id.* at 491. The clause was then adopted in its present form. *Id.* at 492.[9]

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[9] Congressmen-reservists presently draw no pay and it may be that retirement benefits are not munificent. But petitioners could and might return Congressmen-reservists to pay status, Jt. App. 7, 21-23; see p. 40, infra. As noted, respondents were denied discovery to show what perquisites, like travel junkets disguised as "training", use of military aircraft and the like may be showered on reservist-members who happen to sit on key committees. See Pet. App. B 26-27; Jt. App. 5-6, ¶¶ 17-19.

Thus—as with the Establishment clause—the concern of the framers with Article I, § 6 was "quite clearly that" the independence of the legislature "ultimately would be the victim if" the executive could dangle salaried offices supported by the "taxing and spending powers" before individual members. Article I, § 6 "was designed as a specific bulwark against such potential abuses . . . and . . . operates as a specific constitutional limitation upon" such expenditures. *Cf. Flast* v. *Cohen*, 392 U.S. at 103-104.[10]

Respondents have standing as taxpayers.

II. THE CASE IS JUSTICIABLE

Petitioners argue (Br. 29-42) that this case does not present a justiciable controversy, asserting that the constitutional provision that the District Court and Court of Appeals ordered enforced, the Incompatibility clause, may be enforced exclusively by the Congress. The argument is that there is "a textually demonstrable commitment of this issue" to Congress. *Baker* v. *Carr, supra*, 369 U.S. at 217. It is bottomed on the premise that the clause establishes a qualification for membership in Congress exactly like those of age, citizenship, inhabitancy within the constituency on election day and popular election, of which only

[10] The *Flast* reasoning is peculiarly apt here:

> The concern of Madison and his supporter was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Congress may be the judge under Article I, § 5. Br. 31-42. Petitioners note that this Court has expressly avoided this question. Br. 32. *Powell* v. *McCormack*, 395 U.S. 486, 421 n. 41.

A. The Incompatibility Clause Does Not Establish a "Qualification."

There are, of course, fairly obvious important differences between the qualifications of age, citizenship and inhabitancy, or that a Senator be elected by the people, on the one hand, and holding incompatible offices on the other. The former are absolute qualifications, based on pre-existing, unchangeable facts. A member cannot change his age or turn an appointment to the Senate by the legislature (which the XVII Amendment abolished) into election by the people. The disability declared by the Incompatibility clause, on the other hand, may be removed by the member. He has a choice between the executive office and the Congressional seat, and if he gives up his office, he becomes entitled to take his seat.

The constitutional qualifications serve very different purposes from the Incompatibility clause. The qualifications serve to assure maturity, commitment to the nation as such and attachment to local interests. They were intended to be minimal, broadly inclusionary qualifications, opening membership in the Congress to all, particularly without regard to wealth or property. See *Powell* v. *McCormack, supra,* 395 U.S. at 532-34. The Incompatibility clause, on the other hand, had a very specific exclusionary purpose—to avoid "the danger of executive influence upon the legislative body." *The Federalist,* No. 76 (Hamilton); see Pet. App. B 20-22.

Moreover, quite unlike the objective qualifications of age, citizenship, inhabitancy and popular election, the removal of the disability created by holding an incompatible office is not only within the control of the member himself but also within the control of the executive. There must be executive action or refusal to act for an incompatibility to be established or maintained. Indeed, it is precisely this characteristic that makes violation of the Incompatibility clause justiciable. A court cannot remedy the want of age or declare that a popular election has taken place when it has not. But a court can remove incompatibility by ordering the executive to discharge the member from his office. Thus, as we shall now see, this case is presented "in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen, supra,* 392 U.S. at 101; *ADAPSO, supra,* 397 U.S. at 151-52.

B. The Incompatibility Clause Reaches the Office as Well as the Seat

To do no more than assert, as petitioners do, that the Incompatibility clause establishes a "qualification" for a seat in Congress, and that only Congress may judge whether a member is or is not so qualified to take his seat, does not answer the question posed in this lawsuit. That question is whether the Incompatibility clause works both ways, and establishes a rule of law, which a court may enforce, that a person may not continue to hold an office after he becomes a member of Congress.

The long line of Congressional precedents petitioners cite (Br. 36-42) does not answer this question. The precedents show simply that Congress has considered the Incompatibility clause as empowering the Congress

to refuse a member his seat. Nowhere do these precedents say or suggest that Congress felt that its jurisdiction, or the remedy of exclusion, were exclusive. As we shall see, precisely because the clause is not merely a qualification but is equally directed at and intended to require divestment of executive office, jurisdiction of the Congress is *not* exclusive.

Petitioners rely on the form of the clause—"no person holding any Office . . . shall be a member of either House . . . ." as showing its one-way reach, and assert that the clause is directed at the holding of a seat in Congress, rather than the holding of Executive office. Br. 31-32. The District Court found that the debates showed that the clause was intended to establish the incompatibility of the two offices and to reach in either direction. Pet. App. B 20-22, 32-34. The District Court's analysis of the debates disposes of petitioners' argument, made below and repeated here (Br. 33-36), that the change in the language of the clause during the debates was intended to aim the Incompatibility clause in only one direction. As characterized in a recent comment, Note, 85 HARV. L. REV. 507 (1971), the District Court found that "the delicate matter of the infringement of the prerogatives of Congress . . . was simply not posed by the nature of the remedy sought," *id.* at 509, and this is more persuasive than the petitioners' "overly refined textual analysis," *id.* at 508.

1. The purpose of the clause

The purpose of the Incompatibility clause was to ensure the separation of the executive and legislative branches. The point was to prevent domination

of the legislature by the executive. See 1 Farrand, *The Records of the Federal Convention of 1787,* at 375-377, 386, 391-394 (1911); 2 *id.,* at 283-289, 490-491; 3 *id.,* at 200-201; *The Federalist,* No. 76 (Hamilton). Military influence was especially feared. H.R. Rep. No. 2205, 55th Cong., 3d Sess., *Appointment of Members of Congress to Military and Other Offices,* Part I at 60-62 (1899). See 1 Hinds, *Precedents of the House of Representatives* ¶ 494 (1907); H.R. Rep. No. 885, *Right of a Representative in Congress to Hold a Commission in the National Guard,* 64th Cong., 1st Sess. (1916) at 4-6; 2 Farrand, *supra,* at 283-289; 3 *id.* at 200-201. The purpose is obviously equally well served and the incompatibility eliminated whether the one office or the other is vacated. See 1 Farrand, *supra,* at 20, 218, 375-377, 379-381, 391-394; 2 *id.* at 284-291; 3 *id.* at 200-201; *cf.* Bartlett, *Cases of Contested Election in Congress, 1834-1865* (1865) at 92-94, 395; H.R. Rep. No. 885, *supra,* at 4-5.

Hence the Incompatibility clause operates as a restraint on both the Executive and Legislative; both are under an equal obligation to obey and enforce its provisions. See Madison, *Notes of Debates in the Federal Constitution of 1787,* 450-457 (1966 ed.); 1 Farrand, *supra,* at 381-382, 391-394; 2 *id.* at 287, 490-491; 3 *id.* at 200-201; H.R. Rep. No. 885, *supra.* If anything, the remedy of removal from office, not from the Congress, is to be preferred. As the House found in 1899,

> It is evident that it was the policy of the framers of our Constitution to prohibit Senators and Representatives in Congress *while remaining such from holding any other office* under the United States, and no plainer language to declare the pur-

> pose could have been used than the words of the Constitution, viz: "No person holding any office under the United States shall be a member of either House during his continuance in office."

H.R. Rep. No. 2205, *supra,* Part I at 60 (emphasis added).

2. "Acceptance of the second office vacates the first"

The Congressmen-reservists whose offices are in question here accepted membership in Congress after having joined the reserve. "Acceptance of the second office vacates the first," and the Incompatibility clause reaches and requires removal from the first, reserve, office. Pet. App. B 33.

This is confirmed by the report of the House Committee on Elections in the case of Frank P. Blair, Jr., and Robert C. Schenck, H.R. Rep. No. 110, 38th Cong., 1st Sess. (1864). Both Blair and Schenck held volunteer commissions at the time they were elected to the House. Schenck resigned his commission and took his seat; Blair chose to give up his seat and command an army corps. H.R. Rep. No. 2205, *supra,* at 42 (1899). But the Committee's discussion is illuminating. First it asked the question:

> 1st. Can the two offices of representative in Congress and major general of volunteers be held by the same person at the same time?

H.R. Rep. No. 110, *supra,* at 4.

It then dealt with the meaning of incompatibility:

> The duties of the two offices are so entirely incompatible, that this of itself, were there no other obstacle, would render their discharge by the same person an impossibility. The representative is elected by the *people,* and represents them in the

> House, discharging the duties they require of him under the Constitution; the major general is appointed by the *President,* by and with the advice and consent of the Senate, and is required to *obey* him as commander-in-chief, and "no man can serve two masters."

Ibid. (emphasis in original)

Moreover

> The attempt to invest the same person with two offices—one legislative and the other executive—and require of him at the same time the discharge of the duties of both, is, whether they be conflicting or not, a commingling of the duties of the executive and legislative departments. It is bringing the Executive himself into the very halls of Congress, and if persisted in, might ultimately prove as pernicious as if he had a seat therein, and as many votes as he had commissions.

Id. at 5.

The committee turned next to the issue of the two-way thrust of the Incompatibility clause:

> The next question arising in this case is, What effect does the acceptance and discharge of the duties of the one office have upon the tenure of the other? So far as congressional action is concerned, this question has been answered in the answer already given to the one of incompatibility. *The acceptance and discharge of the duties of any such office vacates any incompatible office at that time held* .... A man is not held incompetent to accept and enter upon the duties of any such office while holding one whose duties are incompatible; but his so doing is treated and held to be a resignation or vacating of any such office.

Id. at 6-7 (emphasis added).

Of course, "the mere appointment or election to an office, the duties of which are incompatible with those of one already held, will not vacate such office" as long as it is "unaccompanied with consent or acceptance." Then, quoting ancient English case-law, the Committee concluded "The appointment of a person to a second office incompatible with the first is not absolutely void, but on his subsequently *accepting* the appointment and *qualifying,* the first office is *ipso facto* vacated." *Id.* at 7-8 (emphasis in original).

Finally the Committee was

> of opinion that the reasons in which this constitutional provision originated, as well as its express language and the practice of the House under it, are in harmony with the rule of law which existed before the formation of the Constitution, that the acceptance and entering upon the discharge of the duties of an office, which, from the nature of its duties, or from express legal or constitutional prohibition, is incompatible with another previously held, *vacated the former office from the time of such acceptance* and entering upon the duties assigned to the latter office.
>
> And, consequently, *when a person elected to Congress accepts that office,* or qualifies and enters upon the discharge of its duties, *he vacates or forfeits any office he may then hold under the United States.* And when any member of Congress, after he has qualified or entered upon the discharge of his duties as such member, accepts or enters upon the discharge of the duties of "any office under the United States," he *ipso facto,* vacates or forfeits his seat as a member of Congress.

Id. at 9 (emphasis added).

The matter was finally resolved by a joint resolution of both House and Senate, adopted after an attempt to

evade the clause by permitting Blair to resign temporarily from Congress was defeated:

> Resolved, That *an officer of the United States* whose resignation has been duly accepted and taken effect, or *who, having been elected a member of either House of Congress, qualifies and enters on the discharge of the duties of a Member, is thereby,* in either case, *out of the office previously held,* and can not be restored to it without a new appointment in the manner provided by the Constitution.

1 Hinds, *Precedents of the House of Representatives,* ¶492 at 603 (1907) (emphasis added).

In short, as the Congress ruled, the incompatibility is to be eliminated by vacation of the earlier office; indeed (as we have noted, p. 29 *supra*) membership in Congress is to be preferred if possible and the executive office vacated.

C. The Incompatibility Clause Imposes a Judicially Enforceable Duty Upon Petitioners

1. The right to sit in Congress is not an issue in this case

The issue in this case is whether agencies of the United States, executive branch officials, the Secretary of Defense and the service Secretaries, may maintain members of Congress in such an office in the face of the Incompatibility clause. Very simply, it is whether the petitioners are bound to obey, or as they assert may disregard, this provision of the Constitution.

The issue here is not nor did the lower courts here decide "whether members of Congress who hold reserve

commissions are barred from serving as 'a member of either House' ", Br. 42. The District Court held that

> it is clear that defendants, as the superiors of Reserve officers within the Executive branch, have the right and the power to remove Congressmen from the Reserve offices they held at the time of their election, and that their failure to do so is subject to judicial review.

Pet. App B 33-34.

Thus the question in this case is not the existence of a "textually demonstrable commitment" to the Congress of the power to judge the qualifications and right to be seated of an elected member of Congress, *cf. Powell* v. *McCormack*, 395 U.S. 486. The question here is one of petitioners' duty to remove members of Congress from the Reserves if holding reserve membership is found to violate the Incompatibility clause. There certainly is no "commitment" of that question either to Congress or to the Executive branch. It is justiciable.

2. The incompatibility clause imposes a duty upon petitioners

The judgments below are based on the proposition that where the Constitution establishes a rule, the rule applies to all officers of government whose acts may be involved in or (as here) necessary to a violation of the rule. The proposition seems simple and uncontrovertible. Petitioners take an oath to support and obey the Constitution. Not only the courts, but "other departments, are bound by" the Constitution. *Marbury* v. *Madison*, 1 Cranch 137, 180. Since Chief Justice Marshall wrote this dictum, suggestions that an executive officer or administrative agency is not bound by the Constitution have been made so rarely that judicial

restatements of the basic rule are hard to find. But it has been held that the obligation imposed on the President (and hence on his executive branch subordinates) includes the duty to take care that the Constitution and "the rights, duties and obligations growing out of the Constitution" are enforced. *In re Neagle,* 135 U.S. 1, 63-64. "The prohibitions of the Constitution were designed to apply to all branches of the National Government. . . ." *Reid* v. *Covert,* 354 U.S. 1, 17. As Judge Prettyman has declared:

> Action of Government officials in violation of the Constitution is void . . . . A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials, and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power.

Eisentrager v. *Forrestal,* 174 F.2d 961, 964 (D.C. Cir. 1949) rev'd on other grounds, 339 U.S. 763 [footnotes omitted].

Equally apt are the words of the Florida Supreme Court over half a century ago:

> The Constitution of the United States, within its limited sphere, is the supreme law of the land; and it is the duty of all officials, whether legislative, judicial, executive, administrative or ministerial, to so perform every official act as not to violate the constitutional provisions.

Montgomery v. *State,* 55 Fla. 97, 45 So. 879, 881 (1908).

In short, the heads of executive departments are subject to suit for and may be judicially restrained from

performing acts in violation of the Constitution. *See, e.g., Flast* v. *Cohen,* 392 U.S. 83. After all,

> *it is the province and duty of the judicial department to determine* in cases regularly brought before them, *whether the powers of any branch of the government,* and even those of the legislature in the enactment of laws, *have been exercised in conformity to the Constitution;* and if they have not, to treat their acts as null and void.

Kilbourn v. *Thompson,* 102 U.S. 168, 199, quoted with approval in *Powell* v. *McCormack,* 395 U.S. 486, 506 (emphasis added).

The Court has lately repeated this rule.

> Deciding whether a matter has in any measure been committed by the constitution to another branch of government, *or whether the action of that branch exceeds whatever authority has been committed,* is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Baker v. *Carr,* 369 U.S. 186, 211 (emphasis added).

III. RESERVE MEMBERSHIP IS AN OFFICE WITHIN THE MEANING OF THE INCOMPATIBILITY CLAUSE

After devoting most of their brief (Br. 10-42) to threshold or door-closing arguments, petitioners finally turn to the question whether reserve membership is an "office" proscribed by the Incompatibility clause (Br. 43-40). Their argument is threefold: first, that the clause was not intended to reach this kind of office because it does not pose the dangers anticipated by the Framers (Br. 44-52); second, that a reserve com-

mission is not an "office" anyway because, petitioners assert, the Court of Claims held so in *Simmons* v. *United States,* 55 Ct. Cl. 56 (1920) (Br. 52-54) and because 5 U.S.C. § 2105(d) so provides by statute (Br. 54-57).

A. The Incompatibility Clause Reaches Reserve Office

Respondents, petitioners and the lower courts agree that the purpose of the Incompatibility clause was to eliminate a source of Executive branch influence on the legislative branch. Br. 44-48; pp. 23-25, 28-30, *supra;* Pet. App. B 20-22. Petitioners would doubtless concede that full time military service would be an "office" barred by the Incompatibility clause. They assert, however, that somehow a reserve commission is different.

1. In 1916, in a report unusual for its scholarship, documentation and careful analysis of historical precedents, the House Judiciary Committee concluded that a commission in the National Guard was an "office" within the constitutional prohibition. H.R. Rep. No. 885, 64th Cong., 1st Sess. (1916), *Right of a Representative in Congress to Hold Commission in National Guard.* The committee based its conclusion on a full analysis of the act of Congress creating the National Guard, discussion of many Congressional precedents and applied the definition of "office" given in *United States* v. *Hartwell,* 6 Wall. 385, 393 (1867), as involving "tenure, duration, emoluments and duties." Br. 53 n. 30.

The earliest case, that of John P. Van Ness, Clarke and Hall, *Cases of Contested Elections in Congress, 1789-1834* at 122 (1834), in fact involved an appoint-

ment to the District of Columbia militia—not the regular forces—in 1803: peacetime. Van Ness was expelled from Congress for accepting the 1803 equivalent of a Reserve commission.

The Committee also relied on the case of Representative Edward Baker. Bartlett, *Cases of Contested Elections in Congress, 1834-1865* at 92 (1865). Quoting from the earlier report and applying it to National Guard membership, the 1916 Committee wrote:

> The Constitution intended that the President should have no power to control the action of Congress in any respect; that it should be perfectly independent. Now, suppose that every Member of Congress were a colonel in the Army in the service of the United States, and the President, who is by the Constitution the Commander in Chief of that Army, should come into the Hall of Congress and order each individual Member to retire immediately, under the penalties inflicted for disobedience to orders, to his post in the Army, what would become of Congress? If it be urged that in the performance of his duties as an officer of the militia, only a small portion of his time will be necessary to perform the duties imposed upon him by reason of the office, yet his oath of office requires him to yield obedience to the orders of the President of the United States as Commander in Chief at all times. Thus, he is subject to the orders that may be issued by the Executive and can not, therefore, be an independent Member of the House of Representatives in Congress, as the Constitution of the United States provides he shall be. In other words, there can be no divided allegiance.

H.R. Rep. No. 885, *supra*, at 5.

The 1916 Report relied heavily on an 1899 Report, H.R. Rep. No. 2205, 55th Cong., 3d Sess., p. 29, *supra*. Quoting that report, the 1916 House Committee reiterated the purpose of the Incompatibility clause:

> The framers of the Constitution intended to keep the legislative, judicial, and executive branches of our Government separate and distinct; to prevent Cabinet officers from being Members of Congress, and thereby giving undue power to the President and his immediate advisers; to prevent the centralization of power and office-holding power in a few hands; to prevent judges from acting at the same time as legislators and thus concentrating power in the courts; to avoid the manifold dangers to the existence and perpetuity of our free institutions and a representative government that would follow a concentration of the legislative and judicial or the legislative and executive (the military and naval power being a branch of the executive) in a few and the same hands.
>
> Without this constitutional restraint it would be possible for a President and the Congress to act in collusion; for the Congress to create high military and naval positions without limit and for the President to fill these offices from the ranks of unscrupulous, unpatriotic and ambitious Senators and Representatives in Congress (the Senate confirming, of course), and as the President is Commander in Chief of the Army and Navy, to thus concentrate all power in the hands of the executive branch of the Government. These military legislators might increase the Army, control the elections by the bayonet, and government by the people and for the people would end. Two printed lines in the Constitution of the United States has made all this impossible.

H.R. Rep. No. 885, *supra*, at 6; H.R. Rep. No. 2205, *supra*, at 60.

2. The District Court, relying on these precedents, concluded that "A commission in the modern armed forces reserve cannot fairly be distinguished from a commission in the 1916 National Guard for purposes of" the Incompatibility clause. Pet. App. B 24. Petitioners argue that there is a difference, at least as to Congressmen-reservists, whose pay, benefits, promotion and duties for the present are limited by recent regulations defendants have issued. But the District Court found (Pet. App. B 24, fn. *)

—that reservists "are subject to call and assignment by the President." Petitioners do not dispute this.

—that reservists' "salaries and expenses are paid from federal funds." While Congressmen-reservists presently are not eligible for salaries, this (like the other restrictions on Congressmen's duties, benefits, retirement and promotion as reservists) is by petitioners' own administrative decision, which they may change at any time. See Resp. App. D; Jt. App. 7, ¶¶ 21-33; DOD Directives 1235.9 (September 13, 1967), 1215.6 (August 25, 1969; as amended June 12, 1971); 1200.7 (July 2, 1970).[11] Petitioners say that Congressmen may train only "at their own expense," Br. 50, but by this they mean only that Congressmen receive no pay and allowances; Petitioners do not assert that a Congressman-reservist while training does not receive food, quarters and transportation and use equipment at the government's expense.

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[11] Little reliance may be placed on the immutability of these directives. Petitioners moved to deny promotion credits to Congressmen only *after* the District Court's decisions was announced. DOD Directive 1215.6, June 12, 1971, amendment. We assume that petitioners would oppose any limitation on their authority to resume full training pay, promotion and the like for Congressmen. See, e.g., Jt. App. 7, ¶¶ 21-23.

—that reservists "are subject to the Uniform Code of Military Justice while on duty or while in retired status." Petitioners do not dispute this. 10 U.S.C. § 802.

—that reservists "enlist for definite terms" and "subscribe to the oath of office required of all civil servants." Petitioners do not dispute this.

The characteristics of reserve membership thus satisfy the fourfold test of *United States* v. *Hartwell, supra.* Appointment to a commission creates "tenure." The food, quarters, transportation and other uses of equipment at the expense of the government for a Congressman in training or on other active duty, and his retired pay, are "emoluments." The enlistment "for a definite term" satisfies the requirement of "duration," and being subject to assignment and call and military discipline creates "duties."

More important, even if the four *Hartwell* requirements of "office" were not met, reserve membership has sufficient characteristics of an office to fall within the proscription of the Incompatibility clause—as the House Committee found in 1916 and as the District Court found in 1971. The reason is that the character of even the most restricted kind of reserve participation creates the danger of executive influence upon the legislative branch that the clause was intended to prevent. See the opinion of the District Court, Pet. App. B 26-27, and Note, 85 HARV. L. REV. 507, 513 (1971).

B. The Simmons Case and 5 U.S.C. § 2105(d)

Neither *Simmons* v. *United States, supra,* nor the other decisions cited (Br. 53, 54) touch or were intended even remotely to deal with the definition of

office for purposes of the Incompatibility clause. What may be sound policy with respect to attorneys representing clients or contractors selling to the army cannot reasonably be said to apply to the constitutional issue of separation of powers and the prevention of executive influence upon the legislative branch. *Simmons* itself is of very limited weight even for its own holding; the ruling was made on a motion by a member of the Court of Claims bar and the court noted that "no opinion we could render would be conclusive of the question in other jurisdictions."

Petitioners add nothing to the District Court's dismissal of 5 U.S.C. § 2105(d), Pet. App. B 25, except to argue that this Court should ignore the legislative history of the statute making clear its narrow purpose. H.R. Rep. No. 1884, 71st Cong., 2d Sess. at 2, 3 (1930); 72 Cong. Rec. 11628-29 (1930);[12] 72 Cong. Rec. 11892-93 (1930).[13]

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[12] MR. LAGUARDIA. This only applies to officers in the reserve and removes the disqualification that now exists and prevents them from practicing before the departments.

MR. COLLINS. It goes further than that.

MR. LAGUARDIA. No. I do not think it does.

MR. STAFFORD. Under the reserve officers' law the reserve officer is understood to be an officer of the Government. Then there is a law which forbids officers of the Government practicing before the departments. There are many reserve officers that are attorneys at law. Why should reserve officers in an active state be deprived of the privilege of practicing before the departments? It is their bread and butter. If you do not give them relief, it will result in the withdrawal of, perhaps, 111,000 reserve officers who are now in the Reserve Officers' Corp of the United States Army.

[13] MR. REED. The Senator from Montana objected when the bill was first reached on the calendar, asking for an explanation. I was necessarily absent and was not to make the explanation. Since then he and I have gone over the report on the bill, and the Senator

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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stated in open Senate just before he left the Chamber that he had no further objections.

In a word, this bill meets a decision of the Attorney General to the effect that a reserve officer not on active duty is nevertheless a person holding an office of trust or profit under the United States, and therefore is ineligible, if he is a lawyer, to appear in an argument before the Treasury Department or to argue a tax case. Of course, nobody ever dreamed that a reserve officer should be crippled from pursuing his ordinary peace-time vocation when he was not on active duty; and if the decision were insisted on and applied in parallel cases, it would force the retirement from the Reserve Corps of a large number of valuable, useful officers. Therefore the committee was unanimous in reporting the bill.